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NO. 2 – CONFIDENTIAL BUSINESS INFORMATION

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-739

March 31, 2000

CENTRAL MAINE POWER COMPANY
AND CMP NATURAL GAS, L.L.C.,
Request for Approval of Affiliated Interest
Transaction, Sale of Assets (Property)

ORDER

Chairman Welch; Nugent and Diamond, Commissioners

I. SUMMARY

In this Order, we establish the market value of the electric corridor property rights that Central Maine Power Company (CMP) is selling pursuant to our prior order to its affiliate, CMP Natural Gas, L.L.C. (CMPNG).

II. PROCEDURAL HISTORY

On February 18, 2000 in this docket, we approved a joint application filed by two CMP Group affiliates, CMP and CMPNG, seeking approval pursuant to 35-A M.R.S.A. §§707 and 1101 of an affiliated transaction for the sale by CMP to CMPNG of an easement along CMP's electric corridor in Westbrook. See Order (PUC Feb. 18, 2000) (Feb. 18th Order). CMPNG plans to construct a distribution pipeline on this property to provide natural gas service to the Calpine Corporation's gas-fired electric generation facility.

However, we held open the determination of whether the negotiated price constitutes market value for this transaction until we had received further written comments from the parties to this proceeding. Written comments were filed by CMP, CMPNG, the Office of the Public Advocate (OPA), Northern Utilities, Inc. (Northern), and Bangor Gas Company, L.L.C. (Bangor Gas).

We deliberated this matter on March 16, 2000.

III. LEGAL STANDARD

Section 707(3)(G) of Title 35-A requires that we determine the value of any contract or arrangement that involves the use by an affiliate of utility facilities, services, or intangibles. This provision also states:

When the facilities, services or intangibles are used by the affiliated interest, the utility's costs must be charged to and received from the affiliated interest based upon this value.

Finally, this section provides that the Commission may first approve a contract or arrangement and then make the determination of value within 60 days of granting such approval.

Chapter 820 of our Rules establishes that the value of utility intangibles (other than good will) transferred to an affiliate is the market value of the intangible. Ch. 820 (4)(D). Section 2(G) defines intangibles to include rights of way. Section 7(C)(3)(b) requires a utility to provide a market study or appraisal estimating the market value of the intangible asset.

IV. ANALYSIS AND DECISION

A. Background

1. Relevant Procedural History

The initial application contained the prefiled testimony of Kenneth H. Freye, CMP's Manager of Property Management, in support of CMP's contention that the price negotiated for its easement sale to CMPNG was fair market value. See Pre-filed Direct Testimony and Supplemental Direct Testimony of Kenneth Freye. Mr. Freye also testified on this matter at a hearing held January 5, 2000 before the commission. On February 3, 2000, the Hearing Examiner and Advisory Staff issued an Examiner's Report that contained a recommended market value that differed from the negotiated contract price. Several parties, including CMP and CMPNG, made oral exception to the Examiner's Report on February 8, 2000. The Commission deliberated this docket initially on February 8. In our Feb. 18th Order, we deferred the value issue for further consideration and invited additional written comment from the parties. Final deliberations were held on March 16, 2000.

2. Arguments

Mr. Freye based his opinion that the negotiated price was reasonable on a comparison to prices negotiated recently with other, unaffiliated natural gas pipeline companies for other easements in CMP's electric corridor for placement of parallel gas facilities. The transactions of record include sales of rights-of-way to Maritimes & Northeast Pipeline, L.L.C. (MNE), Portland Natural Gas Transmission System (PNGTS), and the MNE/PNGTS Joint Facilities (joint pipeline). Mr. Freye concluded that the price and terms of CMP's transaction with CMPNG are reasonable because they "compared favorably with the other pipeline deals from a CMP standpoint." Supp. at 10. In addition, a consultant hired by CMP to assist with its negotiations with MNE confirmed that the price

CMP obtained for the joint pipeline and MNE north was at least as high as its approach would have achieved.¹ However, CMP did not provide an appraisal of the particular property at issue in this proceeding.

In the Examiner's Report, the Staff concluded that the sale price agreed upon by the affiliates did not accurately reflect market value of this property sale. Staff's conclusion was based on the negotiating behavior of the affiliates as well as the fact that CMP failed to incorporate several distinctive aspects of this transaction into their evaluation of the sale price. Staff recommended that we determine that the market value, and thus the selling price, should be higher than that agreed to by the affiliates. Staff developed a recommended proxy for market value by comparing the net proceeds to CMP of this transaction with the net proceeds from its sales of similar property rights to MNE.

CMP and CMPNG took exception to Staff's figure and methodology, arguing that the price reached by the affiliates was market value because it was the price a willing buyer and a willing seller had negotiated. CMP and CMPNG further argued that the Staff's proxy was invalid because it relied on calculations of the seller's costs in deriving a proposed sales price or market value.

3. Analysis

This case invites us to find the value that would be placed on this transaction by a willing buyer and a willing seller in an arm's length transaction. We are not persuaded that the price reached by agreement of the affiliates represents market value. As affiliates, buyer and seller do not have the usual incentives that unaffiliated parties would have in negotiating a sale, and the absence of active bargaining in this case enhances our reluctance to simply accept the price set by the parties.² Therefore, we need to analyze the transaction and the record evidence to determine whether or not this negotiated price represents fair market value.

While there may be merit to Staff's contention that the price at which a seller is willing to sell may depend in part on the seller's costs, we believe that the Examiner's Report places too much emphasis on this element. As a practical matter, the seller's transaction costs do not affect the value of the

¹ The consultant, SYNDACO, developed a formulaic approach based on sales of easements in electric corridors to pipeline companies across the nation.

² In our Feb. 18th Order, we noted that CMP and CMPNG agreed to a sales price that was precisely the amount CMPNG had budgeted and communicated to CMP's project manner as early as March 1999, suggesting a need for us "to consider the reasonableness of the price more fully." Feb. 18th Order at 16.

asset to the buyer, which we think is more significant in determining its value in the market place. Therefore, we do not accept the conclusion in the Examiner's Report.

Valuing the easement is made difficult by the absence of competition for the property. Thus, we must look to similar sales to place a value on this particular transaction. The parties and Staff have noted various factors that would tend to contribute to a higher or lower assessment of value for this property when compared to comparable sales to other pipelines. The width of the easement, the size of the pipeline, and the assemblage value are invoked in support of a lower price, while the unique location of the property is argued to support a higher price.

In addition, Staff asserts that CMPNG's circumstances at the time the sale was being negotiated should have raised the market price. These circumstances include the time and resource pressures on CMPNG, the cost of alternatives, and the property acquisition services performed by CMP.

However, there is nothing in the record that quantifies the influence each of these particular factors would exert on the value. There is also no appraisal specific to this property on which we can rely. The prices paid to CMP by other, unaffiliated pipeline companies are in the record, however, and provide a useful reference for market value.

Given the valuation difficulties described above, we believe that the fairest approach is to rely heavily on the price paid to CMP by _____, which we view as the "comparable sale" closest to the one before us of any of the transactions contained in the record. We thus use the per mile price of that easement as the starting point for valuing the sale between CMP and CMPNG. We believe it appropriate, however, to add a modest amount for special steps taken by CMP, including the acquisition of certain property, which made the transaction more valuable to CMPNG. The result is a market value for the easement of _____.

Since the amount at issue in this proceeding is relatively small, we have not required the parties to furnish a detailed professional assessment of the value of the property. For purposes of future cases of this nature, however, we will generally require such an assessment, in accordance with Chapter 820.³

Pursuant to statute, CMP and CMPNG are required to reform their sales agreement to reflect this value. 35-A M.R.S.A. § 707(3)(G).

³ However, we will consider the parties' suggestion that we adopt a de minimis size exemption because in some instances the costs of an appraisal may exceed the value of the asset being sold.

Having each affiliate book this particular amount for this transaction has the dual effect of ensuring that electric ratepayers will not subsidize the affiliate transaction and that the gas affiliate will not obtain a competitive advantage by virtue of engaging in this transaction.

Accordingly, we

ORDER

1. That the value of Central Maine Power Company's easement sale in Westbrook to CMP Natural Gas, L.L.C. is _____.

Dated at Augusta, Maine, this 31st day of March, 2000.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.